COMMONWEALTH OF MASSACHUSETTS

DEPARTMENT OF TELECOMMUNICATIONS AND ENERGY

Investigation by the Department on its own Motion into the Appropriate Regulatory Plan to succeed Price Cap Regulation for Verizon New England Inc. d/b/a Verizon Massachusetts' intrastate retail telecommunications services in the Commonwealth of Massachusetts	)	D.T.E. 01-31

MOTION FOR CONFIDENTIAL TREATMENT

Verizon Massachusetts ("Verizon MA") requests that the Department, in accordance with Mass. General Laws c. 25, § 5D and the Department's Ground Rules in this proceeding, grant this Motion to provide confidential treatment of data that Verizon MA provided to the Department in response to the following discovery requests: AG Set 1, Item Nos. 8, 11, 13, 14 and 17, filed on July 16 and 25, 2001. As shown below, the data qualify as "trade secret" or "confidential, competitively sensitive, proprietary information" under Massachusetts and federal law and are entitled to protection from public disclosure in this proceeding.

ARGUMENT

In determining whether certain information qualifies as a "trade secret,"[1] Massachusetts courts have considered the following:

[1] Under Massachusetts law, a trade secret is "anything tangible or electronically kept or stored which constitutes, represents, evidences or records a secret scientific, technical, merchandising, production or management information design, process, procedure, formula, invention or improvement." Mass. General Laws c. 266, § 30(4); *see also* Mass. General Laws c. 4, § 7. The Massachusetts Supreme Judicial Court, quoting from the Restatement of Torts, § 757, has further stated that "[a] trade secret may consist of any formula, pattern, device or compilation of information which is used in one's business, and which gives him an opportunity to obtain an advantage over competitors.... It may be a formula treating or preserving material, a pattern for a machine or other device, or a list of customers." *J.T. Healy and Son, Inc. v. James Murphy and Son, Inc*., 260 N.E.2d 723, 729 (1970). Massachusetts courts have frequently indicated that "a trade secret need not be a patentable invention." *Jet Spray Cooler, Inc. v. Crampton*, 385 N.E.2d 1349, 1355 (1979).

> (1) the extent to which the information is known outside of the business;
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> (2) the extent to which it is known by employees and others involved in the business;
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> (3) the extent of measures taken by the employer to guard the secrecy of the information;
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> (4) the value of the information to the employer and its competitors;
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> (5) the amount of effort or money expended by the employer in developing the information; and
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> (6) the ease or difficulty with which the information could be properly acquired or duplicated by others.

Jet Spray Cooler, Inc. v. Crampton, 282 N.E.2d 921, 925 (1972).

The protection afforded to trade secrets is widely recognized under both federal and state law. In *Board of Trade of Chicago v. Christie Grain & Stock Co.*, 198 U.S. 236, 250 (1905), the U.S. Supreme Court stated that the board has "the right to keep the work which it had done, or paid for doing, to itself." Similarly, courts in other jurisdictions have found that "[a] trade secret which is used in one's business, and which gives one an opportunity to obtain an advantage over competitors who do not know or use it, is private property which could be rendered valueless ... to its owner if disclosure of the information to the public and to one's competitors were compelled." *Mountain States Telephone and Telegraph Company v. Department of Public Service Regulation*, 634 P.2d 181, 184 (1981).[2]

The Telecommunications Act of 1996, Pub. L. No. 104-104, 110 Stat. 56 (1996), *codified at* 47 U.S.C. §§ 151 et seq., provides further protection for the confidential and proprietary information of telecommunications customers and carriers. *See* 47 U.S.C. § 222. Among other

[2] *See also, e.g., Hearing Officer's Ruling on Motions for Protective Treatment,* D.T.E. 99-105 (2000).

things, § 222 protects both customer proprietary network information and the confidentiality of proprietary carrier data.[3]

The attachment responsive to AG-VZ 1-8 provides the number of wholesale services that a particular competitor has purchased from Verizon MA (grouped by area code) as of a certain date, and information related to the licensing of poles and conduits to that competitor. In particular, the attached chart displays the number of facilities-based (E-911) and resold lines that the competitor purchased from Verizon MA and the specific municipalities where the competitor has entered or requested license agreements with Verizon MA. These data are confidential and proprietary information of the competitor, and Verizon MA may not disclose the data without its authorization. The information, accordingly, was provided only to the Department.

The attachment responsive to AG-VZ 1-11 provides information on specific Verizon MA retail and wholesale services, namely, Flexpath T1, intraLATA special access, and UNE T1 services/facilities. These data reflect, among other things, retail and wholesale monthly circuit

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[3] Section 222(f)(1) defines "customer proprietary network information" in relevant part as:

> (A) information that relates to the quantity, technical configuration, type, destination, and amount of use of a telecommunications service subscribed to by any customer of a telecommunications carrier, and that is made available to the carrier by the customer solely by virtue of the carrier-customer relationship; and
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> (B) information contained in the bills pertaining to telephone exchange service or telephone toll service received by a customer of a carrier.

In addition, §§ 222(a) and (b) provide:

> (a) IN GENERAL.—Every telecommunications carrier has a duty to protect the confidentiality of proprietary information of, and relating to, other telecommunication carriers, equipment manufacturers, and customers, including telecommunication carriers reselling telecommunications services provided by a telecommunications carrier.
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> (b) CONFIDENTIALITY OF CARRIER INFORMATION.—A telecommunications carrier that receives or obtains proprietary information from another carrier for purposes of providing any telecommunications service shall use such information only for such purpose, and shall not use such information for its own marketing efforts.

installation completions, offering intervals, completion intervals, missed installation appointments and total circuits in service. Such detailed product information could provide retail and wholesale competitors with valuable installation, service quality and growth data with which to focus competitive resources and to solicit customers with competing claims of quality assurance.

The attachment responsive to AG-VZ 1-13 identifies Verizon MA operating revenues, expenses, taxes, average net investment and return on investment for each year from 1993 through 2000 on both an unseparated and intrastate basis. The data are confidential and have not been publicly disclosed. Information detailing levels of investments, operating revenues and earnings returns could be competitively useful to other providers in helping to determine investment strategies and decisions in Massachusetts. Like Verizon MA, other competitive providers do not disclose such state-specific information in the ordinary course of business.

The attachment responsive to AG-VZ 1-14 identifies (to the extent available) Verizon MA's residence local exchange, business local exchange, discretionary, intraLATA toll, switched access (inter- and intra-LATA) and directory advertising revenues for each year from 1993 through 2000. As with the information responsive to AG-VZ 1-13, such data are confidential and have not been publicly disclosed. Competitors could find such service-specific information useful in establishing sales strategies that target particular market segments.

Lastly, the attachment to AG-VZ 1-17 identifies a list of new products and services that Verizon MA plans to introduce in each year from (the remainder of) 2001 to 2003. New products currently in development or being prepared for market introduction require confidential treatment to prevent disclosure of Verizon MA's marketing and sales strategies. Such highly proprietary information is jealously guarded by all competitors to prevent premature product

announcements and to ensure that competitors do not have an inappropriate opportunity to respond in an unfair, anticipatory fashion to product rollouts.

The requested data thus represent valuable commercial information that competitors could use to frustrate Verizon MA and competitive-provider efforts in the competitive market. The information for which Verizon MA is requesting protective treatment is compiled from internal databases that are not publicly available, is not shared with any non-Verizon employees for their personal use, and is not considered public information. Any dissemination of this information to non-Verizon employees, such as contracted service providers, is labeled as proprietary. Further, any non-Verizon employees who are working for Verizon and may have access to this information are under a non-disclosure obligation.

Moreover, Verizon MA employees that have access to the market segment data are similarly subject to non-disclosure requirements. For example, employees who use this information during the course of their responsibilities are not permitted to publish the relevant data for general public use or release them for publication by others to the general public. When these data are transferred internally they are transferred over a protected network and are marked proprietary. Public disclosure of the requested information could create a competitive disadvantage for Verizon MA and the relevant provider, and be of value to other carriers in developing competing market strategies targeted to specific services and features. The requested data represent valuable commercial information that competitors could use to frustrate Verizon MA and competitive-provider efforts in the competitive market.[4]

[4] For example, underscoring the confidential and competitively-sensitive nature of the data provided in response to AG-VZ 1-8, Verizon MA sales and marketing personnel are *not* provided access to like competitor information in Verizon MA's possession for the purpose of competing against other providers. The data could be useful to Verizon MA retail representatives (and other competitors that seek to scrutinize Verizon MA's similarly proprietary information) by allowing them to know *which* services warrant greater sales and marketing resources and, correspondingly, which may not. Disclosure of such information inappropriately tips the competitive balance by permitting competitors to target Verizon MA's (and other

In short, the information is not readily available to competitors and would be of value to them in developing competitive marketing strategies. Competitive disadvantage is likely to occur if the confidential information is made public – solely as a result of regulatory oversight.[5] The benefits of nondisclosure, and associated evidence of harm to Verizon MA (and the relevant competitor), outweigh the benefit of public disclosure in this instance. By releasing this information to the public, competitive companies will be able to determine characteristics of Verizon MA's market segments and will have the ability to utilize this information in developing offerings in direct competition with Verizon MA. Historically, both the Department and the telecommunications industry have recognized such information to be confidential and appropriately subject to protection by order and the execution of reasonable nondisclosure agreements. Nothing has changed in terms of law or circumstance that warrants an abandonment of that protection. Given the increasingly competitive telecommunications world, the Department should not now depart from its past practice and apply G.L. c. 25, § 5D to permit competitors to gain access to what is private, commercial information. Disclosure of the competitively sensitive material will undermine Verizon MA's ability to compete with other providers of like services that are not subject to equal public scrutiny. In balancing the public's "right to know" against the public interest in an effectively functioning competitive marketplace, the Department should continue to protect information that, if made public, would likely create a competitive disadvantage for the party complying with legitimate discovery requests.[6]

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competitors') customers to gain a competitive advantage in the marketplace that they otherwise would not enjoy.

5 If Verizon MA were not a regulated entity, the relevant information would not be available for public inspection.

6 In also balancing the interests of Verizon MA with those of the Department and the parties, Verizon MA has agreed to make information responsive to AG 1-11, 1-13, 1-14 and 1-17 available to the parties in this proceeding, subject to a mutually acceptable nondisclosure agreement.

CONCLUSION

WHEREFORE, Verizon MA respectfully requests that the Department grant this Motion to afford confidential treatment to all data contained in the proprietary portions of its responses to AG-VZ 1-8, AG-VZ 1-11, AG-VZ 1-13, AG-VZ 1-14 and AG-VZ 1-17. As demonstrated above, the information is entitled to such protection, and no compelling need exists for public disclosure in this proceeding.

Respectfully submitted,

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Dated: July 25, 2001

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